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No. 89-2008

In the Supreme Court of the United States

OCTOBER TERM, 1990

BILL CLINTON, GOVERNOR OF ARKANSAS, ET AL., APPELLANTS

v.

M.C. JEFFERS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in rejecting appellants' laches defense.

2. Whether the district court correctly held that appellants' state-wide legislative apportionment plan violated Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, based on the determination that black voters in Arkansas have less opportunity than other voters to participate effectively in the political process of electing state legislators.

3. Whether the district court erred in determining that a redrafted legislative apportionment plan could include single-member districts in which black voter majorities would be compact and cohesive.

4. Whether the district court erred in finding that black voters in three districts needed, where possible, voting age majorities of at least 60 percent in order to remedy appellants' Section 2 violation.

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This submission responds to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. In 1989, appellees, black voters in Arkansas, filed this federal court action challenging the State of Arkansas' state-wide legislative apportionment plan under the Voting Rights Act of 1965, 42 U.S.C. 1971 *et seq.*[1] The state legislature consists of a 35-member Senate and a 100-member House of Representatives. At that time, there were five House seats representing districts with black voting age

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[1] The State had adopted the apportionment plan in 1981. J.S. App. 2.

population (VAP) majorities, and one majority-black VAP Senate seat.[2] Blacks constituted 16 percent of the State's population, yet no black legislator had ever been elected from outside a majority-black VAP district. Appellees contended, among other claims, that the state apportionment plan violated Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973, by drawing Senate and House district lines in a way that resulted in black voters having "less opportunity * * * [than other voters] to participate in the political process and to elect representatives of their choice." *Ibid.* Appellees also contended that it was possible to draw an additional eight majority-black VAP House districts and another two majority-black VAP Senate districts around existing concentrations of black citizens in certain parts of the State. J.S. App. 2-8.

2. After a twelve-day trial, the three-judge district court held in December 1989 that appellants' state-wide legislative apportionment plan violated Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973. J.S. App. 1-188. In February 1990, the district court adopted—with modifications—the new apportionment plan submitted by the State Board of Apportionment, thereby creating an additional seven majority-black VAP House districts and another two majority-black VAP Senate districts. J.S. App. 193-228.[3]

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[2] Those House seats included three seats from a three-member district in Pulaski County (Little Rock), one seat from Pine Bluff, Jefferson County, and one seat from Crittendon County that had been created as a result of a previous Voting Rights Act challenge, see *Smith* v. *Clinton*, 687 F. Supp. 1310, remedy adopted, 687 F. Supp. 1361 (E.D. Ark.), aff'd mem., 488 U.S. 988 (1988). The Senate seat represented the Senate district coterminous with the three-member Pulaski County House district. J.S. App. 5-8.

[3] Chief Judge Eisele filed dissents from the district court's liability and remedial opinions. See J.S. App. 46-188, 205-228.

a. As a threshold matter, the district court rejected appellants' laches defense, reiterating that each election held under an unlawful apportionment plan was a new cognizable injury under the Voting Rights Act; that appellees properly awaited the decision in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), before bringing suit; and that appellees should not be faulted for waiting until a number of elections had been held before alleging racial bloc voting. J.S. App. 9-11 (citing *Smith* v. *Clinton*, 687 F. Supp. 1310, 1312-1313, remedy adopted, 687 F. Supp. 1361 (E.D. Ark.), aff'd mem., 488 U.S. 988 (1988)). The court acknowledged the inevitable inconvenience to appellants, but concluded that the expense and disruption—including any that might result from a second reapportionment occasioned by the 1990 census—would be the consequence not of delay, but of any violation proved. J.S. App. 11-12. In the court's view, "fairness and equal opportunity in voting [were] worth it." *Id.* at 12.

b. The district court next rejected appellants' contention that, in order to prevail under Section 2, appellees must prove (and the court must find) two distinct conditions: first, that minority voters lacked an equal opportunity to "participate in the political process," J.S. App. 13, *i.e.*, the existence of legal barriers, and second, that minority voters lacked the opportunity to "elect representatives of their choice," *ibid.* The court concluded that appellants' "argument fails to reckon with the present effects of past racial discrimination," noting in particular that "[t]he hangover from this history necessarily inhibits full participation in the political process." *Id.* at 14 (internal quotation marks and citation omitted); see *Perkins* v. *City of West Helena*, 675 F.2d 201, 211 (8th Cir.), aff'd mem., 459 U.S. 801 (1982). Moreover, the court held that appellants' contention "fail[ed] purely as a logical and linguistic matter." J.S. App. 14. The court pointed out that Section

2 makes it a violation to deny a racial minority *either* equal opportunity to participate *or* equal opportunity to elect. *Id.* at 15. "The right protected is the aggregate of these opportunities—the right to effective participation in the political system." *Id.* at 14.[4]

c. In assessing appellees' Section 2 claim, the court considered the three "necessary preconditions" for a vote-dilution claim, *Gingles*, 478 U.S. at 50, "factors that must be present if the predicate of a vote-dilution claim is to be laid," J.S. App. 16. With respect to the first factor, the court concluded that "black communities in the areas of the State challenged by [appellees] are sufficiently large and geographically compact to constitute a majority in [13 House districts and three Senate districts]." *Id.* at 17.[5] The court acknowledged that some of the "alternative" districts "look rather strange," but found that they were "not materially stranger in shape than at least some of the districts contained in the present * * * plan." *Id.* at 20. And the court found that the suggested district lines did not cross geographic and political boundaries more than is ordinarily necessary to meet the "one-person, one-vote rule." *Ibid.*

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[4] The district court also rejected appellants' argument that the analysis set forth in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), did not apply to cases involving single-member districts. J.S. App. 15-16. The court agreed that "*Thornburg* * * * cannot be automatically applied to the single-member context." *Id.* at 16. Nonetheless, the court concluded that "[w]hether such a [Section 2] claim will succeed depends on the particular factual context, including all of the factors that *Thornburg* * * * and the legislative history of Section 2 say are relevant." *Ibid.*

[5] The court based that conclusion on the maps, testimony, and report of appellees' expert witness, Jerry Wilson, who had drawn 10 new majority-black VAP hypotehtical—or "alternative"—districts to show compactness. See J.S. App. 17-20 (eight new House districts and two new Senate districts).

With respect to the second and third *Gingles* factors, the court found that "voting patterns are highly racially polarized, in the sense that black and white voters prefer different candidates with a high degree of frequency," J.S. App. 20-21, and that "black voters usually vote cohesively," *id.* at 23. The court also found that "the white voting majority is powerful enough, and consistent enough, to defeat black voters' preferences for black candidates almost without exception." *Id.* at 21.[6]

The court next reviewed other relevant evidence in order to decide whether, "on balance, a diminution of black political opportunity, in violation of Section 2 has been shown." J.S. App. 23. The court found the following circumstances: Arkansas has a long (and not remote in time) history of official racial discrimination, including matters affecting voting, *id.* at 25; incidents of racial intimidation at the polls have taken place in recent years, *id.* at 26-27; the present effects of past discrimination are widespread, *id.* at 25; there are continuing socioeconomic disparities between Arkansas blacks and whites that limit blacks' ability to participate meaningfully in the political process, *id.* at 27-28; Arkansas' majority vote requirement makes it more difficult for black candidates to win races for the General Assembly and other state public offices, *id.* at 29;

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[6] The court cited the report of appellees' expert, Dr. Richard Engstrom, which showed that black candidates had lost every one of the ten races for the state legislature in which black candidates ran against white candidates in majority-white VAP districts. J.S. App. 21. The court also found that "[e]vidence concerning so-called exogenous elections, that is, elections for positions other than membership in the State Legislature, also supports [the court's] conclusion." *Ibid.*

The district court excepted Pulaski County from its broad finding with respect to racial bloc voting based on evidence showing that the racial voting patterns that typified politics in the rest of the State did not obtain there. J.S. App. 37-39.

and state elections are still characterized by overt racial appeals or efforts to intimidate black candidates, *id.* at 30.[7]

"Having fully reviewed the relevant factors," the district court then "balance[d] them" and concluded that appellees had shown that the 1981 legislative apportionment plan, as applied to the challenged districts (excepting one in Pulaski County, see J.S. App. 35), violated Section 2. J.S. App. 35. The court accordingly enjoined further elections under the 1981 plan and ordered appellants to formulate a remedial plan. *Id.* at 39-41.

d. Appellees objected to four of the districts in the proposed remedial plan, contending that those districts did not give minority voters a realistic opportunity to elect candidates of their choice. Acting "against a well-documented factual background of black political disadvantage," J.S. App. 199, the district court concluded that a larger margin (60 percent black VAP), where it was possible to create it, better ensured that blacks would have an equal opportunity to elect representatives of their choice. And the court noted that appellants had offered no countervailing reason for doing otherwise. *Id.* at 200. Accordingly, the court agreed with appellees' challenge to three of the four districts. *Id.* at 193, 198-200. The court rejected appellees' challenge to the remaining district on

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[7] The court determined, however, that appellees had not proved that white state legislators were unresponsive to the needs of the black community. J.S. App. 31-33.

Finally, the court found that the Board of Apportionment "did profess allegiance" to a number of general principles of apportionment such as the undesirability of splitting political and natural boundaries, but that "[s]ome of these policies were not consistently applied." J.S. App. 34. The court concluded that "[t]here are a number of cross currents here, and they point in various directions. On the whole, [the court was] not persuaded that this factor ha[d] much weight." *Id.* at 35.

the ground that the lack of an incumbent in that newly created district diminished their need for further relief. *Id.* at 202.[8]

DISCUSSION

The decision of the three-judge district court, holding that the Arkansas 1981 legislative apportionment plan violated Section 2 of the Voting Rights Act, is correct. The decision does not involve a substantial question under the Voting Rights Act and does not conflict with any decision of this Court or any other federal court. Plenary review is therefore unwarranted and the decision should be summarily affirmed.[9]

1. Appellants contend (J.S. 24-27) that the district court abused its discretion in rejecting their laches defense. Application of that equitable defense necessarily involves an assessment of the plaintiff's reasons for the delay in filing a lawsuit and the resulting prejudice to the defendant. See, *e.g.*, *Czaplicki* v. *The Hoegh Silvercloud*, 351 U.S. 525, 533-534 (1956); *Cornetta* v. *United States*, 851 F.2d 1372, 1377-1378 (Fed. Cir. 1988). This Court has made plain that "the existence of laches is a question primarily addressed to the discretion of the trial court." *Gardner* v. *Panama R.R.*, 342 U.S. 29, 30 (1951). For that reason alone, appellants' fact-specific challenge does not warrant plenary review before this Court.

In any event, the district court exercised its sound discretion in rejecting appellants' laches defense. In isolated instances, courts have dismissed voting rights actions on

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[8] Appellees have not sought further review of that aspect of the district court's judgment.

[9] Since the three-judge district court was properly convened under 42 U.S.C. 1971(g), this Court has jurisdiction over the appeal under 28 U.S.C. 1253.

that ground where plaintiffs have brought suit literally within weeks of a crucial deadline.[10] This is not such a case. Appellees filed suit some 14 months before the 1990 elections and waited to do so in order to assess voting patterns under the challenged apportionment plan and to take into account the governing standards set forth in *Gingles*. Moreover, the two reapportionments undertaken by appellants—one in response to the lawsuit and one as a result of the 1990 census—would not have been avoided even if appellees had filed suit promptly in 1982. In other words, in light of appellees' valid reasons for delaying the litigation and the unavoidable expenses incurred by appellants, the district court's rejection of the laches defense is unexceptionable.

2. a. Appellants next contend (J.S. 10-14) that, in order to prove a Section 2 violation in the circumstances of this case, appellees must show not only an inability "to elect representatives of their choice," but also that they had "less opportunity * * * to participate in the political process." 42 U.S.C. 1973(b). Since it can be argued that while appellees proved the first factor, they did not prove the second, appellants contend that the court below erred in finding a Section 2 violation.

Appellants' construction of Section 2 is wrong. The statute does not require the court to make a separate finding about lack of opportunity to participate in order to impose liability. In our view, the district court correctly

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[10] See *Simkins* v. *Gressette*, 631 F.2d 287 (4th Cir. 1980) (action filed two days before filing period opened); *Maryland Citizens for a Representative General Assembly* v. *Governor of Maryland*, 429 F.2d 606 (4th Cir. 1970) (action filed 13 weeks before candidate filing deadline); *MacGovern* v. *Connolly*, 637 F. Supp. 111 (D. Mass. 1986) (action filed three months before primary election); see also *White* v. *Daniel*, 909 F.2d 99 (4th Cir. 1990) (action filed months after last election held under 1981 apportionment plan).

construed the operative language of Section 2 to mean precisely what this Court has said the statute means: "The essence of a [Section] 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47; see J.S. App. 14-15.

Appellants assert (J.A. 11) that decisions such as *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), and *White* v. *Regester*, 412 U.S. 755 (1973), preclude the finding of a Section 2 violation based only on an unequal opportunity to elect candidates of choice. Those decisions do not bear the weight appellants would have them carry. *Whitcomb* and *White* make clear only that a finding of unequal opportunity to elect must be based upon more than a lack of electoral success. On the record presented, that was the case here.

In any event, the record shows that black voters in Arkansas did not have the same opportunities, as have other voters, to participate in the political process. The district court found that there are obstacles to blacks' voting in Arkansas, particularly in the State's Delta region. See J.S. App. 25-26.[11]

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[11] To the extent appellants construe "access to the political process" to mean the absence of formal, legal restraints, such as a literacy test or poll tax, that construction is untenable. Such legal restraints have long been absent from the voting arena; they had certainly vanished by 1982, when Congress amended Section 2 (and by 1986, when this Court decided *Gingles*). There is no sound reason to suppose that Congress and this Court engrafted an element onto Section 2 that will seldom, if ever, be met. And appellants point to nothing, in either the statute itself or the legislative background, suggesting such a radical departure from the plain terms and common-sense construction of Section 2.

b. Appellants also criticize the district court for applying *Gingles* here, asserting without explanation that "the *Gingles* formulation does not fit neatly in a single-member district situation." J.S. 15. That criticism is off the mark. In *Gingles*, this Court stated that "[d]ilution of racial minority group voting strength may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority." 478 U.S. at 46 n.11. And as Justice O'Connor pointed out:

> There is no difference in principle between the varying effects of the alternatives [between choosing at-large and single-member districts] and the varying effects of alternative single-district plans and multi-member districts. The type of districting selected and the way in which district lines are drawn can have a powerful effect on the likelihood that members of a geographically and politically cohesive minority group will be able to elect candidates of their choice.

Id. at 87 (concurring in the judgment). Since the ability to draw nondiscriminatory single-member districts is a prerequisite for a Section 2 challenge to an at-large system, and the drawing of such districts is presumably part of the preferred remedy, there is no reason to suppose—and appellants offer none—that the same ability to draw nondiscriminatory districts is irrelevant to a Section 2 challenge to a single-member district system.[12]

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[12] In decisions before and after *Gingles*, courts have applied Section 2, as amended, to challenges to single-member district systems. See, *e.g.*, *Garza* v. *County of Los Angeles*, No. 90-55944 (9th Cir. Nov. 2, 1990); *Ketchum* v. *Byrne*, 740 F.2d 1398 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985); *Jordan* v. *Winter*, 604 F. Supp. 807 (N.D. Miss.) (three-judge court), aff'd mem. *sub nom. Mississippi Republi-*

3. Appellants next contend (J.S. 15-19) that the district court erred in determining that a redrafted legislative apportionment plan could include single-member districts in which black voter majorities would be compact and cohesive. In particular, appellants first claim (J.S. 15-18) that the court unduly minimized the State's purported interest in drawing district lines that keep small cities intact. We agree that that interest is relevant, see, *e.g.*, *Gingles*, 470 U.S. at 30, but the record belies appellants' claim.

The 1981 apportionment plan did not split small cities. The district court found, however, that the plan did not embody a deep-rooted or accepted state policy. See J.S. App. 34-35.[13] For example, in 1981 one of the State Reapportionment Commission's legal consultants furnished the Commission with a list of apportionment criteria that the Commission incorporated into "guidelines." See I Tr. 7; Pltf. Exh. 14. Although the guidelines called for "maintaining county lines intact whenever possible" and "recognizing important natural, historic, geographical or political boundaries," they also called for maintaining "so far as possible that cognizable and identifiable minority groups are not submerged in such a way as to deny their members any effective representation." X Tr. 162-164; see Pltf. Exh. 14-A Attach. C. In other words, the guidelines did

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can Executive Committee v. *Brooks*, 469 U.S. 1002 (1984). Appellants have cited no case holding Section 2 inapplicable in such circumstances.

[13] As one commentator has observed, Arkansas, unlike a number of other States, has no state law requirement that, in drawing district lines, local political boundaries be respected or that "communities of interest be preserved." See Grofman, *Criteria For Redistricting: A Social Science Perspective*, 33 U.C.L.A. L. Rev. 77, 86-89 (1985) (Table 3).

not, by their terms, mandate preservation of city boundaries.[14]

In the end, the Commission drew district lines that divided many counties and, in so doing, ignored the guidelines' requirement to minimize submergence of minorities. See I Tr. 24; XI Tr. 8-25; Pltf. Exh. 22, at 25. And state legislators showed no overarching concern to keep cities intact. See X Tr. 11, 18, 37, 62, 76, 122, 126-127 (testimony of three Delta-area state legislators). In these circumstances, the district court found that the "cross-currents" embodied in the guidelines "point in various directions," J.S. App. 35, and that non-division principles "were not always consistently applied," *ibid.* The court therefore was "not persuaded that [the] factor [of maintaining city boundaries] has much weight." *Ibid.* Accordingly, the record shows that the district court "fully reviewed" that particular state interest and "balance[d]" it among "the relevant factors." *Ibid.*

Appellants next claim (J.S. 18-19) that the district court failed to make requisite findings—on a district-by-district basis for the newly created districts—that blacks vote cohesively and that the white bloc vote ordinarily defeats the black voters' preferred candidates. The Voting Rights Act requires no such findings. Dilution actions alleging "that the minority group that is sufficiently large and compact to constitute a single-member district has been split between two or more * * * single-member districts, with the

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[14] Indeed, a member of State Reapportionment Commission admitted that

> because politics is really done by county, you don't talk about cities, you don't talk about Fordyce, you talk about Dallas County. * * * General discussion, when people talk politics, at least in Arkansas, * * * rather than name those cities, [they] generally talk counties.

Pltf. Exh. 21, at 25-26 (Clark Deposition).

effect of diluting the potential strength of the minority vote," *Gingles*, 478 U.S. at 50 n.16, necessarily involve voters who had not been voting for the same local offices. To the extent that voters in different single-member districts have had little opportunity to vote for the same candidates, there will necessarily be little evidence of inter-district cohesion. To require such evidence would thus undermine the purposes of Section 2 by effectively immunizing apportionment plans that had successfully fragmented black voting population centers.

Here, the record evinces racial bloc voting in the component parts of all the districts challenged.[15] Since black voters had little opportunity to vote for the same candidates in legislative elections, the district court looked to nonlegislative elections for evidence of racial cohesion and white bloc voting. See J.S. App. 21-23; *Citizens for a Better Gretna* v. *City of Gretna*, 834 F.2d 496, 502 (5th Cir. 1987), cert. denied, 109 S. Ct. 3213 (1989). Accordingly, the remedial districts properly brought together those counties and parts of counties in which there was significant racially polarized bloc voting and black political cohesion.

4. Finally, appellants contend (J.S. 20-21) that the district court erred in finding that black voters in three districts needed, where possible, voting age majorities of at least 60 percent in order to remedy the Section 2 violation. Those districts encompass parts of Lee, St. Francis, Desha, Phillips, and Monroe Counties, where the record showed there had been substantial obstacles to black registration and voting. See, *e.g.*, III Tr. 30-52; Oct. 2, 1989, I Tr. 18-21; Oct. 3, 1989, Tr. 31-36, 50-53, 56.[16]

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[15] See, *e.g.*, III Tr. 141-145, 176, 181, 186-188; IV Tr. 154. 155, 162; V Tr. 100-102; Pltf. Exhs. 3, 15.

[16] Appellants do not challenge the principle that, where access to the political process is limited by present discrimination or the present

Moreover, although the court relied on its previous decision in *Smith* v. *Clinton, supra*, in choosing the particular black VAP percentage, it did so only because "[t]he present case [was] indistinguishable from *Smith* in any significant way." J.S. App. 198.[17] And the court pointed out that, "[i]n reaching this result, [it was] act[ing] against a well-documented factual background of black political disadvantage, some of it due to intentional racial discrimination." *Id.* at 199. Accordingly, appellants' fact-specific challenge to this aspect of the court's remedial order fails.

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effects of past discrimination, a bare majority of the voting age population may not afford blacks a realistic opportunity to elect representatives of their choice. See, *e.g.*, *Ketchum* v. *Byrne*, 740 F.2d 1398, 1410-1416 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985).

[17] The court remarked that the "proof" here was "every bit as cogent on the point, if not more so, than was the proof in *Smith*." J.S. App. 199. Thus, we disagree with appellants (J.S. 20-21) that the court adopted a rigid 60 percent requirement for all cases.

CONCLUSION

The judgment of the district court should be affirmed.
Respectfully submitted.

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